Office-Supreme Court, U.S.
F I L E D
SEP 6 1983
ALEXANDER L. STEVAS,

No. 83-197

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

KOCIAN, CHARLOTTE, T.
Petitioner,

v.

GETTY REFINING AND MARKETING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPONDENT'S BRIEF IN OPPOSITION

Steven B. Feirson
Alan D. Berkowitz
DECHERT PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
Tel.: (215) 972-3400
Attorneys for Respondent, Getty Refining and Marketing Company

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA 19123 (215) 236-2000

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err when it held that since the petitioner never raised the issue below and, in fact, argued a contrary position, she would not be permitted to raise it on appeal?

2. Did the Court of Appeals err when it held that where a charge is never filed with a state agency because the charging party fails to file and where the EEOC acting properly pursuant to its own regulations does not file on her behalf, the charging party is not entitled to the extended filing period provided by statute for those who initiate charges with state or local agencies?

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COUNTERSTATEMENT OF THE CASE

Respondent Getty Refining and Marketing Company ("Getty Refining") incorporates the statement of facts set forth by the Court of Appeals for the Third Circuit. (Petition, pp. 3a-5a)[1]

1. Getty Refining is a wholly owned subsidiary of Getty Oil Company.

REASONS FOR DENYING THE WRIT

Introduction

There are four reasons to deny petitioner's request for a writ of certiorari. First, the position she urges on this Court was never raised in the District Court below. Second, the EEOC regulation on which petitioner bases her challenge has been withdrawn and replaced. Hence, the issue presented by this case is not capable of repetition. Third, there is no split of authority on this matter in the Circuit courts. Finally, petitioner's claim that the decision below conflicts with the rulings of this Court is totally without substance.

I. The Issue Was Not Raised Below

In response to Getty Refining's motion for summary judgment in the District Court, the petitioner took the position that the EEOC had always acted properly and in accordance with all its deferral regulations. In fact, the petitioner submitted an affidavit of the EEOC's regional director stating that the agency had complied with all its regulations in not deferring petitioner's charge to the state agency. Based upon this affidavit and petitioner's arguments to the District Court, the Court of Appeals for the Third Circuit refused to consider petitioner's contrary position on appeal that the EEOC should have deferred:

> In response to Getty's motion for summary judgment, Ms. Kocian submitted the affidavit of the EEOC director in which he stated that the EEOC had complied with all its regulations in not deferring Ms. Kocian's charge. Because Ms. Kocian argued in the District Court that the EEOC complied with its deferral regulations, we will not now enter-

tain any argument that she might be making to the contrary. (Petition, p. 9a n.5) (citation omitted).

The crux of the petition for certiorari filed with this Court is once again that the EEOC acted improperly in failing to defer petitioner's charge to the state agency. Since this argument is directly contrary to the position taken by petitioner below, and was rejected by the Court of Appeals for the Third Circuit on this ground, it should not now serve as the basis for granting the petition requested. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

II. The Issue Presented Is Not Capable Of Repetition

The EEOC regulation which the petitioner urged on the District Court as proper, but which she now seeks to challenge, no longer exists. The regulation in existence when plaintiff filed her charge stated that the EEOC would not defer a charge to the state agency if such a deferral would be futile because the state statute of limitations had already run. This is precisely what transpired in the instant case. The petitioner filed her charge with the EEOC on the 230th day after the alleged act of discrimination. The state agency operated under a 90-day statute of limitations. Therefore, the EEOC, acting pursuant to its regulations, did not defer the charge because it was untimely. The crux of this petition is that the EEOC should have sent the charge to the state agency despite its regulation to the contrary.

However, whether the EEOC should have acted contrary to its own regulations as petitioner now urges is an issue which is not capable of repetition. Subsequent to the filing of petitioner's charge, the EEOC changed its regulations to require deferral even if the charge would be untimely under state law. *See* footnote 4 of the Third Circuit opinion, pp. 8a-9a. Thus, the issue petitioner seeks to present is not of general interest and is limited to the facts of her case.

III. There Is No Split In The Circuits

Petitioner makes no claim that there is any split of authority in the Circuit courts with respect to the issue presented by the petition. Petitioner does not make such a claim because she cannot. Petitioner's claim is extremely limited and very unique. It does not justify this Court's review.

IV. There Is No Conflict With This Court's Decisions

The decision of the United States Court of Appeals for the Third Circuit in this case was really quite simple. The Court held that where a charge is never filed with a state agency because the charging party fails to file and the EEOC acting properly pursuant to its own regulations does not file on her behalf, the charging party is not entitled to the extended filing period provided by statute for those who initiate charges with state or local agencies. Further, the Court held that since the petitioner never raised the issue below and, in fact, argued a contrary position, she would not be permitted to raise it on appeal.

There is nothing in either *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980) or *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979) to the contrary. Petitioner does not cite any language in *Mohasco* or *Oscar Mayer* which grants litigants the right to argue one position in the District Court and then, after losing, argue the opposite in the Court of Appeals. Petitioner cites to nothing in *Mohasco* or *Oscar Mayer* which re-writes Title VII to automatically grant the extended 300-day filing period, meant only to allow time for state agencies to consider charges, to those who have never even filed, or had filed for them, a charge with the state agency.

Mohasco recognizes that the EEOC may, in its discretion, file a charge on behalf of a litigant. *Mohasco* does not hold that the EEOC is obligated to violate its own

regulations and file a charge with a state agency when it believes that charge to be untimely.

Petitioner argues that the decision below conflicts with *Oscar Mayer* because this Court held that federal remedies are not to be consigned to the " 'vagaries of diverse state limitations statutes' ". Petition at p. 13. However, it is petitioner who in fact argues for a rule which would create different filing periods based on nothing more than the state in which one resides. Under petitioner's scheme, if one lives in a deferral state, i.e., a state which has an equal employment agency, then a 300-day limitation automatically would obtain. However, if one lives in a state without a deferral agency, then only a 180-day period would exist. This is directly contrary to what the statute provides. The statute provides an extended filing period not on the basis of where one lives, but rather on the basis of whether a charge has actually been filed with a state agency. No decision of this Court is contrary to this clear language of Title VII. Petitioner was not entitled to the extended filing period for one reason — no action was ever initiated before the state agency. No matter how she may try to disguise it, this fact remains.[2]

2. The Court of Appeals for the Third Circuit did not rule that petitioner was required to file a *timely* charge with the state agency to preserve her remedies under Title VII. Rather, the Court simply ruled in accord with the plain language of the statute and this Court's decision in *Mohasco* that a charge had to be initiated with the state agency before the 300-day period was applicable.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

STEVEN B. FEIRSON
ALAN D. BERKOWITZ
Dechert Price & Rhoads
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
Tel. (215) 972-3400

Attorneys for Respondent,
Getty Refining & Marketing Company

Dated: September 6, 1983